(15)

No. 87-1661

In the Supreme Court of the United States

OCTOBER TERM, 1988

ASARCO INCORPORATED, ET AL., PETITIONERS

v.

FRANK AND LORAIN KADISH, ET AL.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

CHARLES FRIED
Solicitor General

ROGER J. MARZULLA
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

ROBERT L. KLARQUIST
J. CAROL WILLIAMS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether Section 28 of the New Mexico-Arizona Enabling Act (Act of June 20, 1910, ch. 310, 36 Stat. 557) prohibits the leasing of mineral lands held in trust for the benefit of the state's public schools at less than the appraised true value of the lease.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Cases – Continued: Page

Constitutions and statutes:

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INTEREST OF THE UNITED STATES

The question presented is whether Congress, by Section 28 of the New Mexico-Arizona Enabling Act, Act of June 20, 1910, ch. 310, 36 Stat. 557, prohibited the leasing of the mineral lands it granted Arizona, which are held in trust for the benefit of the state's public schools, at less than appraised value. Section 28 expressly provides that the Attorney General is charged with enforcing the Act. Accordingly, the United States has a strong interest in the resolution of the question presented.

In addition, in the submission we made at the Court's invitation prior to the granting of the petition, we noted that, in our view, the plaintiffs do not satisfy the standing requirements of Article III. Under *Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952), this Court therefore lacks jurisdiction even though the plaintiffs have standing under state law. The United States also has an interest in the resolution of these recurring questions of Article III jurisprudence.

STATEMENT

1. In the New Mexico-Arizona Enabling Act (Act of June 20, 1910, ch. 310, 36 Stat. 557), Congress granted Arizona certain numbered sections of every township within the State for the support of public schools. Enabling Act § 24, 36 Stat. 572-573. Known mineral lands were specifically excluded from the grant, but Arizona was authorized to select other lands of equal acreage in lieu of those specified sections known to be mineral in character (*ibid.*). By the Act, Arizona received more than eight million acres for the support of its schools. See *Lassen* v. *Arizona Highway Department*, 385 U.S. 458, 460 n.2 (1967); Pet. App. 4a.

To ensure that Arizona would use the granted lands wisely, Congress provided that the lands were to be held in trust, and set forth explicit terms of the trust in the Enabling Act. *Papasan* v. *Allain*, 478 U.S. 265, 270 (1986). In Paragraph 3 of Section 28 of the Act, Congress provided that the lands may not be sold or leased except to the highest bidder at a public auction following notice by advertisement in two newspapers once a week for ten weeks. 36 Stat. 574. That paragraph originally provided that only leases for a term of five years or less were exempt from the advertising requirement. Paragraph 4 further provided, and still provides that, before any of the land may be sold or leased, it must be appraised, and the sale or lease "shall [not] be made for a consideration less than the value so ascertained."[1] 36 Stat. 574. Congress directed in Paragraph 8 of Section 28 that a permanent segregated fund must be established for all proceeds and rents derived from the land, and that only the interest from the fund, and not the principal, is to be made available for the support of the schools.[2] Pet. App. 52a; see 36 Stat. 575.

[1] Paragraph 4 of Section 28 provides, in full: "All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid."

[2] Arizona has adopted and extended the conditions imposed in the Enabling Act. Article 10 of its Constitution is practically a rescript of Section 28 of the Enabling Act. See *Deer Valley Unified School District No. 97* v. *Superior Court*, 760 P.2d 537 (Ariz. 1988). Section 3 of Article 10 incorporates the Enabling Act's bidding and advertising requirements for sales and leases, and Section 4 incorporates the requirement that "[a]ll lands, lease-holds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained * * *." By Sections 1 and 9 of Article 10 of the Arizona Constitution, the restrictive provisions of the Enabling Act are extended to cover "all lands otherwise Acquired by the State." Thus, Arizona has decided to apply the restrictions of the Enabling Act to all the land it acquires for the school trust. See *Murphy* v. *State*, 65 Ariz. 338, 181 P.2d 336 (Ariz. 1947).

As noted, the original 1910 grant did not include any known mineral lands. However, under *United States* v. *Sweet*, 245 U.S. 563, 572-573 (1918), and *Wyoming* v. *United States*, 255 U.S. 489, 500-501 (1921), unknown mineral lands—*i.e.*, lands containing minerals that were not known to contain minerals at the time of the grant—were conveyed to the State. The distinction that this Court drew between known mineral lands and unknown mineral lands led to numerous land title disputes in many of the western States to which Congress had granted lands to be held in trust for the benefit of public schools. In order to settle such disputes, Congress in 1927 passed the Jones Act (Act of Jan. 25, 1927, ch. 57, 44 Stat. 1026), which extended the original grants to cover mineral lands as well. Congress provided, however, that any disposition of the lands must contain a reservation of the minerals to the State. § 1(b), 44 Stat. 1026-1027). The Act also empowered each State to lease the mineral lands "as the State legislature may direct," and provided that any proceeds, rents, or royalties from these lands are "to be utilized for the support or in the aid of the common or public schools" (*ibid.*).

Section 28 of the Enabling Act has been amended subsequent to the enactment of the Jones Act to provide specific mineral leasing rules applicable to Arizona's school trust lands. In 1936, Congress struck the clause of Section 28 that had excluded leases for a term of five years or less from the Act's advertising requirements. Act of June 5, 1936, ch. 517, 49 Stat. 1477. In its place, Congress distinguished between leasing for grazing and agricultural purposes and leasing for mineral purposes. It

authorized leases for grazing and agricultural purposes for ten years and leases for mineral purposes for 20 years, and provided that the leasing was to be conducted "in a manner as the State legislature may direct" (49 Stat. 1477). The 1936 amendment did not amend the language in Paragraph 4 of Section 28 of the Enabling Act requiring that "[a]ll lands, leaseholds, timber, and other products of land before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for less than the value so ascertained * * *." 36 Stat. 574.

In 1951, the Enabling Act was again amended to establish special rules for mineral leases for the exploration, development, and production of oil, gas, and other hydrocarbons. Act of June 2, 1951, ch. 120, 65 Stat. 51. Congress provided that such leases could be for a term of 20 years or less. As under the 1936 amendment regulating other mineral leases, the revised Section 28 provides that oil and gas leases may be made "in such manner as the Legislature of the State of Arizona may prescribe * * *." 65 Stat. 52. Unlike the provision relating to other mineral leases, the provision relating to oil and gas leases explicitly exempts them from the advertisement, bidding, and appraisal restrictions of the Enabling Act.[3]

2. The Arizona statute governing mineral leasing on state land requires that every mineral lease "provide for payment to the state by the lessee of a royalty of five per cent of the net value of the minerals produced for the claim." Ariz. Rev. Stat. Ann. § 27-234(B) (1976 & Supp. 1988). Net value is further defined as gross value after processing minus certain costs, such as production costs, transportation costs, and taxes. *Ibid.* Under

[3] Section 28, as revised by the 1951 amendments, authorizes "the leasing of any of said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas, and other hydrocarbon substances on, in, or under said lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance[s] may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of royalty to said State of not less than 12½% per centum of production * * *." 65 Stat. 52.

this scheme, the value of a claim is never individually determined and, therefore, there is no guarantee that the State will receive, at the least, the value ascertained by an appraisal. Rather, a flat royalty is applied in every case and, where deductible costs exceed gross value, no royalty at all is paid.

Several individual taxpayers who claim that their taxes support public education in Arizona and the Arizona Education Association, which represents approximately 20,000 public school teachers throughout the state, brought suit in state court against the pertinent state officials and a mining company seeking a declaration that Ariz. Rev. Stat. § 27.234(B) (1976 & Supp. 1988) is void and related relief.[4] On cross-motions for summary judgment, the trial court found that Ariz. Rev. Stat. Ann. § 27-234(B) does not violate the Enabling Act or the Arizona Constitution. Pet. 37a-39a.

3. The Supreme Court of Arizona reversed. Pet. App. 1a-36a. It first noted the "sad experience" that led Congress to enact the strict trust terms of the New Mexico-Arizona Enabling Act. Pet. App. 5a-6a (quoting *Murphy*, 65 Ariz. at 351, 181 P.2d at 344). Of the 23 states that had previously been granted lands, the " 'dissipation of the funds by one device or another, sanctioned or permitted by the legislatures of the several states, left a scandal in virtually every state' " by 1910 (*id.* at 5a). Through the New Mexico-Arizona Enabling Act, Congress intended "to severely circumscribe the power of state government to deal with the assets of the common school trust" (*id.* at 6a). The court noted (*id.* at 20a) that in *Lassen*, 385 U.S. at 463, 466, this Court observed that "[t]he central problem which confronted the [Enabling] Act's draftsmen was * * * to devise constraints which would assure that the trust received in full fair compensation for trust lands," and they solved this problem by

[4] The originally named defendants were the Arizona State Land Department, the State Land Commissioner, and Cyprus Pima Mining Company. Magma Copper Company, Asarco, Inc., James Sullivan, Eisenhower Mining Company, and Can-Am Corporation were permitted to intervene as defendants. The trial court subsequently certified the case as a defendant class action, the class consisting of all present and future mineral lessees of state land.

"unequivocally demand[ing] * * * that the trust receive the full value of any lands transferred from it."

The court below rejected the mining companies' contention that the Jones Act and the 1936 amendment of Section 28 of the Enabling Act—which, like the Jones Act, authorized non-hydrocarbon mineral leasing "in such manner as the Legislature of the State of Arizona may prescribe"—free the Arizona legislature, in making mineral leases, from the terms of the trust established by the 1910 Enabling Act. That contention, the court held, "is completely contrary to the objectives sought by the restrictive wording of other portions of the Enabling Act" (Pet. App. 14a). As did the courts in *State Land Department* v. *Tucson Rock & Sand Co.*, 12 Ariz. App. 193, 195, 469 P.2d 85, 87 (1970), vacated on other grounds, 107 Ariz. 74, 481 P.2d 867 (1971), and *Oklahoma Education Association* v. *Nigh*, 642 P.2d 230, 237 (Okla. 1982), the Arizona Supreme Court concluded that that language "is not an unbridled grant of power that would allow the legislature to avoid the trust restrictions and duties imposed by the entirety of the Enabling Act," but instead grants authority to set lease terms not in conflict with the express terms of the Enabling Act (Pet. App. 15a).

The court further stated that the amendment of Section 28 of the Enabling Act in 1951 reinforced its conclusion that the 1936 amendment of the Enabling Act did not give the legislature authority to avoid the appraisal requirement. The 1951 amendment added the provision stating that oil and gas leases (but not other mineral leases) could be "made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe." 65 Stat. 52. By that amendment, the court stated, "Congress showed that when it intended to free the state from the dispositional restrictions, it would do so explicitly" (Pet. App. 19a). "Moreover," the court added (*id.* at 20a), "if Congress did not regard the dispositional restrictions of the original Enabling Act as effective against mineral leases, why

did it bother to create specific exemptions in 1951 for oil, gas, and other hydrocarbon leases?"[5]

The Arizona Supreme Court also noted that this Court's decision in *Alamo Land & Cattle Co.* v. *Arizona,* 424 U.S. 295 (1976), supported its decision. In that case, the federal government had condemned school trust lands, and a company that had leased some of the condemned lands from Arizona sought an award to compensate it for the fact that the rent it owed the State was less than the fair rental value of the property. In remanding the case for further determinations, the Court questioned the validity of the company's claim, even though Section 28 of the Enabling Act provides that grazing lands, like mineral lands, may be leased "in such manner as the Legislature of the State of Arizona may prescribe." 65 Stat. 52. The Court relied on the fact that, notwithstanding that provision, Section 28 "has a protective provision against the initial setting of lease rentals at less than fair rental value" that "provides that a leasehold before being offered, shall be appraised at 'true value' " (424 U.S. at 305, 306).[6] The decision in *Alamo*, the Arizona Supreme Court stated, "seem[s] fully dispositive of the issue" presented in this case (Pet. App. 22a).

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[5] The Arizona Supreme Court also found support for its construction of Section 28 in Joint Resolution No. 7 (S.J. Res. 38, ch. 28, 45 Stat. 58), a 1928 congressional resolution relating to New Mexico. The resolution stated that New Mexico could amend its constitution to provide that mineral leases on school lands "may be made under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement, and competitive bidding, and containing such terms and provisions, as may be provided by act of the legislature." If Congress had generally intended through the Jones Act to authorize the state legislatures to avoid the appraisal, advertisement, and competitive bidding requirements, then, the court concluded, "it would have used explicit language to accomplish that result, just as it did for New Mexico in Joint Resolution No. 7" (Pet. App. 17a).

[6] The Court in *Alamo Land & Cattle Co.* further explained that a difference between the "rental specified in the lease and the fair rental value" could arise in one of two ways (424 U.S. at 304). First, it could be that "the lease rentals were set initially at less than fair rental value" (*ibid.*), in which case the lease would be void under Section 28 of the Enabling Act. Second, the lease might

Having concluded that "the Enabling Act and its rescript in art. 10 of the Arizona Constitution * * * forbid the state from making nonhydrocarbon mineral leases without appraisal or for less than their true value" (Pet. App. 24a), the court then considered the validity of the state's mining statute. Because the statute provides that the royalty due is five percent of the net value of the minerals produced, and the deductible costs used to calculate net value may exceed the gross value of the minerals, the court concluded that "under § 27-234(B) it is possible for a lessee to extract minerals from school trust lands and pay no royalty whatsoever" (*id.* at 26a). After adding that "we have no way of knowing from this record whether such circumstances have existed" (*ibid.*), the court remanded with instructions that the trial court enter a judgment declaring the statute unconstitutional and take further evidence to determine "what further relief is appropriate" (*id.* at 29a).

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction because 28 U.S.C. 1257 authorizes review only of "[f]inal judgments or decrees" of state courts, and this case is in an interlocutory posture. On remand, the trial court will first need to determine whether the State has received "true value," or any value, for mineral leases on the school trust lands. It will then have to decide what "substantial conformity" in Paragraph 9 of Section 28 of the Enabling Act means, an issue of federal law, because that Paragraph provides that leases not made in substantial conformity with the requirements of the Enabling Act are void. Finally, it will have to apply its legal determination on that issue to the facts that it finds in order to determine whether any leases are void. In that situation, where important federal legal issues and key factual questions must be addressed on remand, this Court lacks jurisdiction. *Flynt* v. *Ohio,* 451 U.S. 619, 620 (1981); *Minnick*

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initially have been set at the fair rental value, but that value might have increased during the term of the lease (*id.* at 305), in which case the company might be entitled to an award to compensate it for the loss of the lease. The Court remanded with instructions that the lower courts determine how the difference between the rental specified in the lease and the fair rental value arose and enter judgment accordingly (*id.* at 311).

v. *California Department of Corrections,* 452 U.S. 105, 127 (1981); see *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 476-487 (1975).

2. The plaintiffs lack standing under Article III to bring suit challenging Arizona's mineral leasing statute. The individual plaintiffs claim standing merely as taxpayers, and this Court has repeatedly rejected claims that a person may bring suit under Article III based on his status as a citizen or taxpayer. Rather, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright,* 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 472 (1982). The individual plaintiffs have not alleged such injury; their claim that their tax rates will be lowered by the relief they request is, as Asarco itself argued in the trial court, "wholly speculative." Asarco's Reply to Pltf. Response to Asarco's First Mot. to Dismiss, Aug. 13, 1981, Memo. at 9. The Arizona Education Association likewise has failed to show that its members are likely to benefit from the relief requested.

It follows for Article III purposes that the decision of the Arizona Supreme Court is, in effect, an advisory opinion. In *Doremus* v. *Board of Education,* 342 U.S. 429, 434 (1952), this Court held that while a state court may "render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory, * * * because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such." As that holding makes clear, this Court lacks power to review a decision, such as the decision below, where the plaintiffs lack standing under Article III.

3. If this Court concludes that it has jurisdiction, it should affirm the decision below. Paragraph 4 of Section 28 of the Enabling Act provides that the school trust lands must be appraised before being leased, and further provides that the school trust must receive, at the least, the appraised value for any lease.

Paragraph 3 of Section 28 excepts oil and gas leases, but not other mineral leases, from the appraisal requirement. Thus, as this Court held in *Alamo Land & Cattle Co.*, 424 U.S. at 306, the Enabling Act plainly requires that, "before being offered," school trust land other than that leased for oil and gas production "shall be appraised at 'true value.' "

Contrary to petitioner's argument that the unknown mineral lands that passed to Arizona in 1910 were not covered by the appraisal requirement, Paragraph 4 of Section 28 expressly subjects *all* leaseholds of lands granted by the Enabling Act to its restrictions. Nor is there merit to petitioners' contention that the known mineral lands that passed under the Jones Act in 1927 passed free of the appraised requirement. Nothing in that Act explicitly so provides, and, since the appraisal requirement was "[u]ndoubtedly the most important restriction" (Pet. App. 23a), there is no basis for concluding that Congress intended to do away with that restriction in the absence of clear evidence that it so intended. Moreover, the 1951 amendment to Section 28, which freed oil and gas leases, but not other mineral leases, from the appraisal requirement, shows that Congress did not intend to do away with that requirement with respect to petitioners' leases. Furthermore, petitioners' contention that the mineral lands are not subject to any restrictions is completely undercut by the terms of Article 10 of the Arizona Constitution, which specifically incorporates the restrictions in Section 28 of the Enabling Act and extends them to all the land Arizona acquires.

ARGUMENT

I. THIS COURT LACKS JURISDICTION BECAUSE THERE HAS BEEN NO "FINAL JUDGMENT OR DECREE" AS REQUIRED BY 28 U.S.C. 1257

Although 28 U.S.C. 1254 allows interlocutory review of decisions of federal courts, 28 U.S.C. 1257 provides that this Court may review only "[f]inal judgments or decrees" of state courts. "In general, the final-judgment rule has been interpreted 'to preclude reviewability . . . where anything further remains to be

determined by a State court, no matter how dissociated from the only federal issue that has been finally adjudicated by the highest court of the State.' " *Flynt* v. *Ohio,* 451 U.S. 619, 620 (1981), quoting *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 124 (1945). There is much to be determined on remand here. Section 28 provides that leases "not made in *substantial conformity* with the provisions of this Act shall be null and void" (emphasis added), and the state courts here have not yet decided what criteria will be used to determine whether a lease is in "substantial conformity" with the terms of the Act. In addition, the court below stated that it had "no way of knowing from this record" whether mineral lessees had paid "true value" (or any amount), as required by Paragraph 4 of Section 28, and ordered further factfinding. Thus, it is not clear whether any leases will be declared void. Accordingly, this Court lacks jurisdiction at this time to review the Arizona Supreme Court's decision under 28 U.S.C. 1257(3), the basis of jurisdiction on which petitioners rely.

To be sure, there are "four categories of * * * cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 477 (1975). By and large, those cases involved situations where the "additional proceedings would not require the decision of other federal questions that might also require review by the Court" (*ibid.*). This case is not one of those. The key legal decision to be made on remand, what "substantial conformity" in Section 28 of the Enabling Act means, is plainly a question of federal law. Moreover, it is a question that may be crucial to the ultimate resolution of this lawsuit, since the courts below may conclude that any lease for which the State has received or is likely to receive true value will be held to be valid despite the absence of an appraisal. Accordingly, review at this time would be premature.

More detailed consideration of the four exceptions listed in *Cox* to Section 1257's rule that only final judgments of state

courts are reviewable confirms that review is not proper. The first category includes case where "the outcome of further proceedings [is] preordained" (420 U.S. at 479). That is obviously not the case here. While Paragraph 9 of Section 28 provides that leases "not made in substantial conformity with the provisions of this Act shall be null and void," it is not yet clear, as we have stated, whether petitioners' leases substantially conform to the requirements of the Enabling Act. Only if petitioners were willing to concede that their leases are null and void would the outcome on remand be preordained and review be proper now.[7]

The second exception to Section 1257's finality requirement involves cases where " 'the federal questions that could come here have been adjudicated by the State court,' " and the state court issues that remain to be decided are essentially ministerial. *Cox,* 420 U.S. at 480, quoting *Radio Station WOW,* 326 U.S. at 127. This exception is plainly inapplicable here since, as noted, important federal issues remain to be decided on remand. The third exception, cases where "later review of the federal issue cannot be had, whatever the ultimate outcome of the case" (*Cox,* 420 U.S. at 481), is likewise plainly inapplicable. If petitioner's leases are declared void on remand, the federal question they seek to resolve now would not be moot and no disability

[7] By contrast, in *Duquesne Light Co.* v. *Barasch,* No. 87-1160 (Jan. 11, 1989), the Pennsylvania Supreme Court, reversing a decision of the state's public utilities commission, decided that a state statute prohibited a utility from recovering the costs of a nuclear power plant that never went into service, rejected the utility's argument that the state law thus interpreted constituted a taking of property without just compensation under the federal Constitution, and remanded for the issuance of a rate order giving effect to its conclusion (slip op. 5). This Court held that the Pennsylvania Supreme Court's decision, while not final because of the remand for a corrected rate order deleting the allowance of recovery for the costs expended in building the canceled nuclear power plant, fell into the first exception listed in *Cox.* The Court explained that the "Pennsylvania Supreme Court has finally adjudicated the constitutionality of [the state statute] in the context of otherwise completed rate proceedings and so has left 'the outcome of further proceedings preordained.' " Slip op. 6 (quoting *Cox,* 420 U.S. at 479). Here, however, the answer to the question whether petitioners' leases are valid, the ultimate issue in this case, is not preordained.

that does not presently exist (see pages 14-20, *infra*) would bar them from seeking review.

The final exception consists of cases where "the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, * * * reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action, * * * [and] a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox,* 420 U.S. at 482-483. While the court below could, following remand, amend its decision so that it is based entirely (rather than alternatively) on state law grounds, which would preclude review by this Court, this final exception to Section 1257 is also inapplicable here. First, petitioners, "the party seeking review here," cannot moot the federal issue by prevailing on state grounds. While the restrictions on disposal of the school trust lands in the Arizona Constitution may be more or less stringent than the restrictions in the Enabling Act, if they are *less* stringent Arizona (and petitioners) must nevertheless abide by the federal restrictions as well. Second, reversal of the decision below by this Court would not "preclud[e] * * * further litigation" because the requirements of Article 10 of the Arizona Constitution may well be *more* restrictive than the requirements of the Enabling Act; so that question would remain and the litigation would continue. Cf. *Deer Valley Unified School District No. 97* v. *Superior Court,* 760 P.2d 537, 541 (Ariz. 1988), where the Arizona Supreme Court declined to interpret language in the state Constitution as this Court had interpreted identical language in the Enabling Act because it concluded that this Court's decision was not sufficiently protective of the school trust fund. And third, there is no basis for a contention that federal policy would be "seriously erode[d]" if this Court does not review the decision below now.

Since no exception to the plain language of Section 1257 applies here, this Court lacks jurisdiction. Moreover, this case presents a situation where a difficult question of federal law (the meaning of "substantial conformity" in Paragraph 9 of Section 28) remains to be decided on remand and there is no good

reason not to wait for a final judgment. To the contrary, there are important reasons to await a final judgment because, along with the legal issue that will need to be addressed on remand, important factual findings will be made as well. At this stage, as the court below stated (Pet. App. 26a), the record discloses very little about the value that Arizona has received in exchange for mineral leases on the school trust lands, and that information, which is to be supplied on remand, will inform any subsequent judgment on the importance and merits of the legal issues presented. Cf. *Minnick* v. *California Department of Corrections,* 452 U.S. 105, 127 (1981) ("because of significant ambiguities in the record concerning both the extent to which race or sex has been used as a factor in making promotions and the justifications for such use, we conclude that we should not address the constitutional issues until the proceedings in the trial court are finally concluded"). Here, moreover, resolution of the issues remaining to be determined on remand may obviate any need for this Court to address federal constitutional questions in this case (see Point II, *infra*). Thus, the normal policy disfavoring unnecessary decision of constitutional questions further supports application of Section 1257's plain terms here.

II. BECAUSE THE PLAINTIFFS LACK ARTICLE III STANDING, THIS COURT LACKS JURISDICTION

A. The Plaintiffs Lack Standing Because They Have Alleged No Personal Injury Likely To Be Redressed By The Relief They Have Requested

If this Court determines that the judgment below is final under 28 U.S.C. 1257, it should nevertheless dismiss for lack of jurisdiction because the plaintiffs lack Article III standing. The "core component" of standing under Article III is that the plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). The plaintiffs here, individual citizens of Arizona and an association

that represents Arizona teachers, falter under each aspect of that test.

The individual plaintiffs claimed standing merely as taxpayers, rather than because their own more specific interests were injured. Complaint para. III. Under Arizona law, taxpayers have standing to seek to enjoin pecuniary loss to the public fisc. *Smith* v. *Graham County Community College District,* 123 Ariz. 431, 600 P.2d 44 (Ariz. App. 1979). Although the courts of the states are not barred by the federal Constitution from recognizing standing on such a theory, this Court has consistently held that a person does not satisfy the standing requirement of Article III based on nothing more than his status as a citizen or taxpayer who is interested in the conduct of his government. *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208, 215-221 (1974); *United States* v. *Richardson,* 418 U.S. 166, 171-175 (1974); *Doremus* v. *Board of Education,* 342 U.S. 429, 433-435 (1952); *Frothingham* v. *Mellon,* 262 U.S. 447 (1923); cf. *Allen,* 468 U.S. at 754-755, 756 n.21; *Valley Forge,* 454 U.S. at 482, 489-490 n.20. Accordingly, the individual taxpayers lack standing to invoke the jurisdiction of an Article III court.

Although Arizona has liberal standing rules, petitioner Asarco, after intervening in the superior court, moved to dismiss the complaint on the ground that the plaintiffs lack standing.[8] With respect to the individual plaintiffs, Asarco described as "wholly speculative" their claim that they had suffered from higher taxes because the mineral leasing scheme set fourth by Arizona statute conflicts with Section 28 of the Enabling Act. Asarco's Reply to Pltf. Response to Asarco's First Mot. to Dismiss, Aug. 13, 1981, Memo. at 9. Asarco explained that even if a different leasing scheme generated more revenue, the state legislature, rather than lowering taxes, might well take the money from the state's general revenues that is currently spent on education and spend it on other programs. Even under Arizona law, Asarco contended, the plaintiffs lack standing

[8] The superior court denied the motion without opinion by Order of March 30, 1982.

"because a prediction of legislative behavior is pure conjecture" (*ibid.*).

In arguing that the individual plaintiffs lack standing, Asarco was right, at least under federal law. Although petitioners argued in this Court in their supplemental brief in support of their petition for a writ of certiorari, without acknowledging their prior inconsistent position, that the individual plaintiffs brought "a good-faith pocketbook action" (Supp. Br. 3), any claim that the plaintiffs have suffered economic injury as a result of Arizona's mineral leasing law is far too tenuous to support standing under Article III. As an initial matter, it is not clear that a mineral leasing law requiring prior appraisal of the value of the leasehold would generate additional funds. Amicus Clinton Campbell Contractor, Inc., suggested in its brief filed prior to the granting of the petition (at 9) that "mineral explorers will shun Arizona's trust land" if appraisal is required, preferring "land in other states or jurisdictions" where such a requirement, which that amicus predicts will be very burdensome, is not mandated. Whatever the merits of that prediction, it is clear that, if the mining companies' leases are declared void, as the plaintiffs have requested (Pet. App. 38a), then state revenues from mineral leases will decline in the short term. And even if a revised leasing law would thereafter generate additional revenue, it is not clear that lower taxes would follow, as Asarco argued in the superior court. Moreover, the likely effect of any tax adjustment on each of the millions of individual taxpayers across the State would be very slight. That is all the more reason to give dispositive weight to the fact that it is "wholly speculative" whether tax rates will be affected at all.

Thus, while this Court has stated that taxpayers have standing where they seek "to restrain unconstitutional acts which result in *direct pecuniary injury*" (*Doremus*, 342 U.S. at 434 (emphasis added)), the plaintiffs have established no such injury here. Rather, "[t]he links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing" (*Allen*, 468 U.S. at 759). Petitioners have cited no case

comparable to this one where taxpayers have been found to have standing.[9]

Asarco was also correct, under federal law at least, when it argued to the superior court that the Arizona Education Association lacks standing.[10] While the Association alleged that "[t]he failure of the defendants to collect the true value on leases of State mineral lands * * * imposes an adverse economic impact on the Association and its members" (Complaint para. IV), by which it presumably means that the teachers it represents will receive more pay if it prevails in this suit, it is not at all clear that the result would be " 'likely' to follow from a favorable decision." *Allen*, 468 U.S. at 751 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976)). There has been no showing that, *if* the State ultimately receives additional revenues as a result of leasing mineral lands following an appraisal, the state's teachers will receive pay raises they otherwise would not receive. It would seem at least as likely that, if additional revenues are received from mineral leases, then general funds currently spent on education will be put to other uses. Even if additional funds from mineral leases are used to benefit the schools, it is not at all clear that the benefits will be in the form of increased teacher compensation. Thus, the "links in the chain of causation" (*Allen*, 468 U.S. at 759) between a revised mineral leasing statute and a pay raise for

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[9] Petitioners primarily rely (Supp. Br. 3) on *Everson* v. *Board of Education*, 330 U.S. 1 (1947), where the Court rejected a challenge to the use of public funds for the transportation of parochial school students without discussing whether the plaintiffs had standing. The other cases petitioners have cited are also Establishment Clause cases, and, prior to this Court's decision in *Valley Forge*, "special hospitality [was] shown to standing to advance Establishment Clause claims." 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* 654 (1984).

[10] While Asarco previously agreed that the Association "can show no adverse economic impact which is not remote and speculative" (Asarco's Reply to Pltf. Response to Asarco's First Mot. to Dismiss, Aug. 13, 1981, Memo. at 10), petitioners now argue, without explaining or acknowledging their change of position, that the Association has made "an acceptable allegation of direct injury" (Supp. Br. 4).

teachers are extremely weak.[11] Accordingly, like the individual plaintiffs, the Association lacks standing because it has failed to allege personal injury fairly traceable to the defendants' conduct that is likely to be redressed as a result of the lawsuit.

B. This Court Lacks Jurisdiction If The Plaintiffs Do Not Have Standing Under Article III

If the plaintiffs lack standing under Article III, then this Court lacks jurisdiction to review the Arizona Supreme Court's judgment, even though the mining companies may well be injured by the relief to be granted on remand. In *Doremus,* this Court held that while a state court may "render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory, * * * because our own jurisdiction is cast in terms of case or controversy, we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such" (342 U.S. at 434). See also *Phillips Petroleum Co.* v. *Shutts,* 472 U.S. 797, 804 (1985); *Secretary of State of Maryland* v. *J. H. Munson Co.,* 467 U.S. 947, 954 & n.4 (1984); *Revere* v. *Massachusetts General Hospital,* 463 U.S. 239, 243 (1983). That holding is controlling here if, as we have argued, the decision below constitutes, at this juncture, an advisory opinion for Article III purposes.[12]

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[11] Petitioners also note that, in addition to suggesting that teachers' compensation would be increased if the plaintiffs are granted the relief they seek, the Association alleges that "the 'quality of education in Arizona' has been adversely affected by the state's failure to require an appraisal before leasing mineral rights (Supp. Br. 4 (quoting Compl. para. IV)). That general allegation fails to show that the Association " 'personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.' " *Valley Forge,* 454 U.S. at 472 (quoting *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 99 (1979)).

[12] It has been suggested that *Doremus* could be read to mean that dismissal of a petition for a writ of certiorari is appropriate only if a state supreme court *rejected* the plaintiff's challenge in a proceeding in which the plaintiff did not satisfy Article III's standing requirements, and that this Court properly could vacate a state court decision that *sustained* the challenge in such a proceeding.

The conclusion that this Court lacks jurisdiction if the plaintiffs lack standing under Article III is the only conclusion that comports with the constitutional basis for the requirement that plaintiffs must allege that they have suffered personal injury fairly traceable to the defendant's conduct that is likely to be redressed by the lawsuit. Where the plaintiffs lack Article III standing, this Court lacks authority to decide their claim, and the Arizona Supreme Court cannot confer jurisdiction on this Court simply by addressing a question of federal law. Petitioners have not attempted to explain what gives this Court jurisdiction over this case if the plaintiffs lack standing under Article III. Rather, they argue that it would be more convenient for them if this Court reviewed their challenge to the merits of the Arizona Supreme Court's decision now. Convenience, however, does not confer power to resolve lawsuits where there is no case or controversy, since "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies' " (*Allen,* 468 U.S. at 750).[13]

See *Barnes* v. *Kline,* 759 F.2d 21, 63 n.16 (D.C. Cir. 1984), vacated as moot, 479 U.S. 361 (1987) (Bork, J., dissenting), vacated as moot, 479 U.S. 361 (1987); L. Tribe, *American Constitutional Law* 114 n.20 (2d ed. 1988). We disagree. *Doremus* appears to make clear that a federal court will not give preclusive effect to the unreviewed state court decision in a future case, not that this Court could vacate a state court decision on review in the *same* case because of the absence of a case or controversy. The latter suggestion would have been inconsistent with the Court's explicit disclaimer (342 U.S. at 434) of any suggestion that a state court is barred from rendering an advisory opinion on a federal constitutional question where Article III standing is lacking. Moreover, there would be an additional step from the proposition that this Court could vacate a state court decision construing federal law where the plaintiffs lacked Article III standing to the conclusion that this Court may review the decision on the merits, despite the absence of a case or controversy. The fact that the plaintiffs have obtained a judgment in their favor and are now respondents does not, in our view, transform them into proper Article III adversaries with a different stake in the underlying controversy.

[13] Although petitioners now state that "[b]oth sides believed that they were asking the Arizona courts to resolve a genuine dispute, and those courts would be *surprised* to learn that they had rendered a mere *advisory opinion*" (Supp. Br. 4-5 (emphasis added)), Asarco told the superior court that, "[n]o matter how genuinely felt or loudly proclaimed, general dissatisfaction with

Moreover, the practical problems petitioners face are not as difficult as they suggest. Petitioners first state that they would have "an uphill battle" avoiding the collateral estoppel effect of the decision below in a subsequent action they might bring in a federal court challenging any relief that may be granted on remand (Supp. Br. 5).[14] But if, as we submit, the plaintiffs lack standing under Article III and the decision below therefore amounts to no more than an advisory opinion that cannot provide the basis "for conclusive disposition of an issue of federal law" (*Doremus,* 342 U.S. at 434), the lower federal courts clearly would not be bound by it.

Petitioners also note that the fact that the decision below is, for Article III purposes, an advisory opinion, "is small solace" to them since "the whole issue may be concluded by conforming legislative action" (Supp. Br. 6). That, however, is merely a species of the classic argument for advisory opinions to inform legislative action—an argument incompatible with Article III. Indeed, petitioners' situation would be entirely comparable if the Arizona Attorney General had issued an advisory opinion concluding that the state's mineral leasing scheme violated Section 28 of the Enabling Act. In that circumstance the legislature might also amend the statute to cure the defect, but petitioners could not suggest that this Court somehow had jurisdiction to review an advisory opinion if a state attorney general, rather than a state supreme court, had issued it.

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legislative action, which has no direct adverse impact upon the parties seeking to invoke the judicial machinery, is no substitute for the jurisdictional prerequisite of standing to sue. * * * [Plaintiffs] may not seek what would amount to an *advisory opinion* from the courts." Asarco's Reply to Pltf. Response to Asarco's First Mot. to Dismiss, Aug. 13, 1981, at 3 (emphasis added).

[14] If the superior court ultimately invalidates any lease, then the injured mining company would have standing to bring a declaratory judgment action in federal court seeking an order that nothing in the Enabling Act required that invalidation. Indeed, in light of the decision below, they may now have standing to bring such an action.

III. ARIZONA'S SCHOOL TRUST LANDS MAY NOT BE LEASED FOR LESS THAN THEIR APPRAISED VALUE

A. Section 28 Plainly Provides That The School Trust Lands "Shall Be Appraised At Their True Value" And Prohibits Leases "For A Consideration Less Than The Value So Ascertained"

If this Court concludes that it has jurisdiction to review petitioner's claims, then it should affirm the decision of the Arizona Supreme Court. As that court concluded, Section 28 of the Enabling Act plainly requires that, if school trust lands are leased for mineral purposes other than the production of oil and gas, they must be leased at their true value as determined by an appraisal.

Paragraph 3 of Section 28 provides generally that school trust lands may not be sold or leased "except to the highest and best bidder at a public auction, * * * notice of which public auction shall first have been duly given by advertisement." It also establishes certain detailed rules concerning the nature of the advertising and the auction. Immediately following the lengthy sentence establishing the advertising and auction rules, Paragraph 3 lists four provisos relating to leasing, two of which govern mineral lands. The first of the two provisos relating to mineral leases states that "[n]othing herein contained" prohibits the state legislature from prescribing rules governing leasing "for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less." The second provides that "[n]othing herein contained" prohibits leasing for the production of oil, gas, and other hydrocarbon substances "in any manner, *with or without* advertisement, bidding, or *appraisement,* and under such terms and provisions as the Legislature of the State of Arizona may prescribe" (emphasis added). 65 Stat. 51-52. A separate paragraph, Paragraph 4 of Section 28, states the requirement at issue in this case. It provides that "[a]ll * * * leaseholds, * * * before being offered, shall be appraised at their true value, and no sale or other

disposal thereof shall be made for a consideration less than the value so ascertained." 36 Stat. 574.

The natural reading of the language of Section 28 is that mineral leases, other than for the production of oil and gas, must be made at true value as determined by an appraisal. Paragraph 4 provides generally that all leases must be made at that value. Paragraph 3 provides an explicit exception to the appraisal requirement for oil and gas leases, but does not provide an exception for other mineral leases. Therefore, the conclusion seems inescapable that leases for other mineral purposes must be made at appraised value.

Moreover, this natural reading is strongly supported by the statutory purposes. As this Court recognized in *Lassen,* 385 U.S. at 463, 466, "[t]he central problem which confronted the Act's draftsmen was * * * to devise constraints which would assure that the trust received in full fair compensation for trust lands," and they solved this problem by "unequivocally demand[ing] * * * that the trust receive the full value of any lands [or leaseholds] transferred from it." The Arizona Supreme Court similarly stated, with respect to the restrictions established by the Enabling Act, "[u]ndoubtedly the most important restriction is the appraisal/true value requirement." Pet. App. 23a. Thus, requiring that the school trust fund receive the appraised value of any disposition of minerals on the school trust lands gives effect to the key provision and central purpose of Section 28.[15]

Petitioners' argument that no mineral lands must be appraised before being leased (Pet. Br. 21) hinges on the phrase

[15] Petitioners argue (Pet. Br. 31, 43), relying on a statement made in 1921 with respect to a bill that was not passed, that it is practically impossible to appraise mineral lands. That is not so. While it can be difficult, mineral lands are regularly appraised in connection with condemnation proceedings, as petitioners acknowledge (Pet. Br. 36). Moreover, as petitioners also recognize (Pet. Br. 7), Arizona law currently provides for the granting of exclusive prospecting licenses that give a preference to the prospector in obtaining a lease if minerals are discovered. Requiring prospecting prior to leasing would make appraisal easier, while a preference in favor of prospectors encourages exploration, and neither is inconsistent with the requirement that the State obtain true value for mineral leases.

"[n]othing herein contained shall prevent," which precedes the four provisos listed in paragraph 3 of Section 28, and the statement in three of the four provisos, including the provisos relating to mineral leases, that the land may be leased "as the Legislature of the State of Arizona may prescribe." Petitioners contend that the language freed the legislature from all of the restrictions in the Enabling Act. As the court below concluded (Pet. App. 15a), however, that language is logically read as giving the legislature "power to regulate the overall manner of the making of the lease, and the general terms of the lease, so long as there is substantial conformity to the restrictions of § 28." The Arizona Supreme Court's construction properly recognized that the appraisal requirement was critical to the scheme Congress established, since it was the key restriction designed to avoid the "sad experience" of other states (Pet. App. 5a).

The language on which petitioners rely can also be read to eliminate the advertising requirement but not the appraisal requirement. As originally enacted, Paragraph 3 of Section 28 provided, immediately following the sentence establishing the advertising requirement, that "nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required" (Pet. Br. 9a). Thus, the phrase "nothing herein contained," as first drafted, referred to no restriction other than the advertising restriction; it plainly did not lift the appraisal requirement.[16] There is no indication that Congress ever intended to expand its meaning.

While subsequent amendments to Paragraph 3 of Section 28 have made it less clear whether the phrase "nothing herein contained" still refers only to the advertising requirement established by the sentence immediately preceding the phrase, that is a reasonable way to read it. Indeed, that is how the drafters of the Arizona Constitution have read it. The rescript of the Enabling Act restrictions contained in Article 10 of the State

[16] This straightforward reading is not contradicted by petitioners' argument (Pet. Br. 21) that "herein," as used elsewhere in the Enabling Act, sometimes refers to more than the paragraph in which the word is used.

Constitution deviates from the language of Section 28 of the Enabling Act in that the words "without advertisement" are inserted at the end of the exceptions relating to leases other than for oil and gas production.[17] Thus, the parallel provision of the State Constitution appears to authorize the legislature to avoid the advertising requirement only. It plainly does not authorize the legislature to avoid the appraisal requirement, which is contained in Section 4 of Article 10 of the State Constitution and is not mentioned in the provision of the State Constitution giving the legislature authority over the manner of leasing nonhydrocarbon mineral lands.[18]

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[17] Article 10, section 3 of the Arizona Constitution provides, in pertinent part (emphasis added):

> Nothing herein, or elsewhere in article X contained, shall prevent:
>
> 1. The leasing of any of the lands referred to in this article in such manner as the Legislature may prescribe, for grazing, agricultural, commercial and homesite purposes, for a term of ten years or less, *without advertisement*.
>
> 2. The leasing of any of said lands, in such manner as the Legislature may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas and other hydrocarbon substances, for a term of twenty years or less, *without advertisement* • • •.

[18] Petitioners have not attempted to come to grips with the fact that Article 10 of the Arizona Constitution, while similar to Section 28 of the Enabling Act, differs in certain respects, and, even in those respects in which it does not differ, may be given a different construction by the Arizona courts. Since the court below relied alternatively on the Arizona Constitution ("[w]e hold, therefore, that A.R.S. § 27-234 violates art. 10 of the Arizona Constitution and § 28 of the Enabling Act" (Pet. App. 27a)), that defect is fatal. At most, this Court may remand this case to the Arizona Supreme Court with instructions that it may not base its holding on the Enabling Act. Given the different language of the State Constitution, however, and the court's decision below and in *Deer Valley Unified School District No. 97*, 760 P.2d at 541, where the court recently declined to follow a decision of this Court construing the Enabling Act "in interpreting the identical language in the Arizona Constitution" because the court concluded that this Court's analysis was not sufficiently protective of the school trust fund, it seems clear that the result below will not change. For that reason, this Court may wish to decline the question presented if it determines that it has jurisdiction.

Indeed, in *Alamo Land & Cattle Co.* this Court read Section 28 as requiring an appraisal before lands are leased for purposes other than oil and gas production. The Court held that the Act requires that grazing leases, "before being offered, shall be appraised at 'true value' " (424 U.S. at 306). As it does with respect to mineral leases other than for the production of oil and gas, Section 28 provides that "[n]othing herein contained" prohibits grazing leases of a certain term, and states that such leases may be made "under such terms and provisions as the Legislature of the State of Arizona may prescribe." Accordingly, this Court has already concluded that the exception clause in Paragraph 3 of Section 28 does not free Arizona from the appraisal restriction. There is no reason in this case to depart from that reading, which follows from the plain language of the statute and gives effect to its key provision.

B. The History Of The Enabling Act Confirms That Mineral Lands Are Subject To The Requirement That They Be Appraised Prior To Being Leased And Leased At No Less Than Their Appraised Value

Contrary to petitioners' contentions, the history of the Enabling Act and related enactments, including the Jones Act of 1927 and Article 10 of the Arizona Constitution, confirms that the Enabling Act, both as enacted in 1910 and as amended, subjects all of the school trust lands, except for lands used for oil and gas production, to the requirement, set forth in paragraph 4 of Section 28, that they be appraised prior to being leased and leased "for a consideration [no] less than the value so ascertained."

Adopting the New Mexico Supreme Court's analysis in *Neel* v. *Barker*, 204 P. 205 (1922), petitioners argue (Pet. Br. 24-25) that the unknown mineral lands that passed to Arizona under this Court's decision in *Wyoming* v. *United States* were never subject to the restrictions in the Enabling Act. The trial court in *Neel* reasoned, and the New Mexico Supreme Court agreed (204 P. at 207), that Congress in 1910 did not intend to convey mineral lands under the Enabling Act, so it " 'did not have in mind a mineral lease' " in drafting the restrictions in Section 28,

and those restrictions therefore do not apply to mineral leases. That argument is severely flawed. First, the court in *Neel* erred in its basic assumption that Congress did not have mineral lands in mind when it granted the school trust lands in Arizona in 1910. The rationale underlying the Court's decision in *Wyoming* v. *United States,* which held that unknown mineral lands passed under school trust grants, was that Congress, while intending to require the States to trade known mineral lands in the numbered sections granted them for other lands, did not intend that its "grant should be rendered nugatory by any future discoveries of mineral" (255 U.S. at 499). Since Congress undoubtedly knew that much western land not known to contain minerals at the time of a grant would subsequently be discovered to contain minerals, yet it intended to grant those unknown mineral lands to the States, Congress contemplated grants of mineral lands.

In any event, Congress in 1910 comprehensively subjected "[a]ll lands, leaseholds, timber, and other products of land" to the appraisal requirement. Accordingly, mineral leases are plainly subject to the requirement, and that is so whether or not Congress specifically had mineral leases in mind. For example, Congress did not have condominiums or shopping malls in mind when it drafted the Enabling Act in 1910, but no one would suggest that the school trust lands may be sold or leased to a condominium builder or a shopping mall developer without an appraisal. Indeed, since the broad language of Paragraph 4 subjecting *all* leaseholds to its restrictions was designed to ensure that the trust would receive "true value" upon disposition of the granted land, there is no reason to believe that Congress intended to require advertising and an appraisal before every small tract of non-mineral land, even desert land, is sold or leased, while simultaneously allowing the disposal of the mineral wealth contained in the trust lands without any restrictions at all.

Nor are petitioners correct in contending (Pet. Br. 26-34) that the known mineral lands that Congress conveyed to the States by means of the Jones Act in 1927 passed without restriction. While the Jones Act does not itself contain restrictions comparable to those found in Section 28 of the Enabling Act, Section 1(a) of the Jones Act expressly provides that the prior grants are "extended" to cover known mineral lands and that the Jones Act grant was "of the same effect" as the prior school trust land grants.[19] Providing that the grant was "of the same effect" was clearly more efficient than attempting to list all of the restrictions in the many prior acts granting school trust lands to the western States.[20]

Nor did the language of the Jones Act authorizing mineral leasing in the manner that the legislatures of the various States direct free Arizona from the appraisal requirement, for the same reasons that the parallel language added to the Enabling Act in 1936 did not have that effect (see pages 22-25, *supra*). Moreover, petitioners' interpretation of the Jones Act would mean that the Jones Act perpetuated the very problem it was intended to solve. Since, in our view, the unknown mineral lands undoubtedly passed to Arizona in 1910 subject to the terms of the school trust, then, if the known mineral lands passed in 1927 outside the terms of the trust, it would be necessary to determine whether each parcel of school trust land containing minerals was known to contain minerals in 1910 in order to

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[19] Petitioners complain (Pet. Br. 33-34) that Congress should have treated the western States uniformly by placing the same restrictions on each State. However, Congress's overriding purpose in enacting the Jones Act was to settle the costly litigation over whether lands were known to contain minerals at the time of the prior grants to the States, not to revise its prior grants to treat the States uniformly. See, *e.g.*, S. Rep. 603, 69th Cong., 1st Sess. 1-2 (1926).

[20] Petitioners argue (Pet. Br. 32-34) that by the "same effect" language Congress meant no more than that the lands granted under the Jones Act would pass and vest in the same manner as prior grants. That, however, is not what the Jones Act says. Section 1(a) provides that "the grant of numbered mineral sections under this Act shall be of the same effect as prior grants for the numbered nonmineral sections, *and* titled to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections" (emphasis added). 44 Stat. 1026. The comments of ~~Senator~~ Secretary Work upon which petitioners rely (Pet. Br. 33) plainly refer to the portion of the sentence following the word, "and," and shed no light on the meaning of the phrase "of the same effect."

determine whether the restrictions of the Enabling Act applied. That is surely not the result Congress intended.

The 1928 amendment of the New Mexico Constitution also supports the conclusion that the restrictions in Section 28 apply to mineral lands in Arizona. Despite the New Mexico Supreme Court's ruling in *Neel* v. *Barker* that the Enabling Act's restrictions did not apply to the unknown mineral lands in New Mexico that passed to the state pursuant to the Enabling Act in 1910, and the passage of the Jones Act, which petitioners contend passed the known mineral lands to the western States free of any restrictions, the Governor of New Mexico, concerned that the restrictions in the Enabling Act applied to the mineral lands granted New Mexico, petitioned Congress to pass a joint resolution authorizing the State to amend its Constitution to exempt mineral leases from the restrictions of the Enabling Act. A New Mexico congressman advised Congress that the resolution was needed so that "New Mexico will be relieved from some provisions of its enabling act," including the restriction at issue. 69 Cong. Rec. 2095 (1928) (statement of Rep. Morrow). Thus, petitioners err in suggesting (Pet. Br. 24-25) that it was understood that the Jones Act freed the mineral lands in the western States of the restrictions in the various enabling acts.[21]

[21] Contrary to petitioner's contentions (Pet. Br. 37-39), the 1936 amendment to the Enabling Act, which authorized mineral leasing in the manner prescribed by the Arizona legislature, does not support their argument. The committee reports described that amendment as "remov[ing] *certain* restrictions contained in the Enabling Act." S. Rep. 1939, 74th Cong., 2d Sess. 2 (1936); H.R. Rep. 2615, 74th Cong., 2d Sess. 2 (1936) (emphasis added). Obviously, the restrictions could be removed only if they applied, contrary to petitioners' contentions. While it is not clear exactly what restrictions Congress removed in 1936, the statements in the legislative history are congruent with either of our interpretations (see pages 22-24, *supra*) of the language added by the 1936 amendment. If the purpose of the amendment was to remove the advertising requirements only, as the drafters of the conforming amendment to the Arizona Constitution concluded, then those were the restrictions that were removed. If, as the court below concluded (Pet. App. 15a), the purpose was to allow leasing in "substantial conformity" with the requirements of Section 28, though not all its details, then those were the restrictions that were removed. There is no evidence at all that Congress intended to remove the appraisal requirement.

At all events, Article 10 of the Arizona Constitution provides in Section 1 that both the lands transferred to the State pursuant to the Enabling Act "*and all lands otherwise acquired by the State,* shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided" (emphasis added). Section 9 of Article 10 of the Arizona Constitution reiterates that "*all lands otherwise acquired by the State* * * * may be sold or leased by the State in the manner, and on the conditions, and with the limitations, prescribed by the said Enabling Act and this Constitution" (emphasis added). Thus, it is clear beyond dispute that the unknown mineral lands that passed to Arizona in 1910 and the known mineral lands that passed in 1927 are subject to the restrictions applicable to all the school trust lands, including the appraisal requirement, unless the Enabling Act and the Arizona Constitution expressly remove the restrictions. Since, as we have shown, neither the Enabling Act nor the Arizona Constitution has been amended to repeal the appraisal requirement, except for lands used for oil and gas production, that requirement applies to all other school trust mineral lands.[22]

[22] Moreover, as the court below concluded (Pet. App. 20a), the 1951 amendment to the Enabling Act confirms that the appraisal requirement applies to mineral leases other than for oil and gas production. By lifting the appraisal requirement in the sentence in Paragraph 3 of Section 28 referring to oil and gas leases, while making no mention of the appraisal requirement in the preceding sentence relating to leasing for other mineral purposes, Congress obviously intended to continue to require an appraisal before the school trust lands in Arizona are leased for the production of minerals other than oil and gas.

CONCLUSION

This Court should dismiss the petition for lack of jurisdiction. If it does not, the judgment of the Arizona Supreme Court should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROGER J. MARZULLA
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

ROBERT L. KLARQUIST
J. CAROL WILLIAMS
Attorneys

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